

Parenting After Separation



Public Legal Education and Information Service of New Brunswick (PLEIS-NB) is a non-profit organization. Its goal is to provide the public with information on the law. PLEIS-NB receives funding and in-kind support from the Department of Justice Canada, the New Brunswick Law Foundation and the New Brunswick Department of Justice and Public Safety.

This booklet replaces a former PLEIS-NB publication titled “*Custody and Access in New Brunswick*” that explained the law and rules with the terminology under former versions of the Canadian *Divorce Act* and the former New Brunswick *Family Services Act*.

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This booklet is intended for general information only. It does not contain a complete statement of the law in the area and laws change from time to time. Anyone requiring advice about his or her specific situation should contact a lawyer. We gratefully acknowledge the assistance provided by members of the Department of Justice Canada, and the New Brunswick Department of Justice and Public Safety.



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On March 1, 2021, changes to the Federal *Divorce Act*, which applies to married persons who are divorced or divorcing, came into effect marking the first significant overhaul of this law since 1985. There are changes to the terminology that apply when dealing with parenting post-separation. Many of these changes in terminology will also be reflected in the New Brunswick *Family Law Act*, a provincial legislation, which also comes into force on March 1, 2021. Some of the language used may differ depending on whether parents were married or cohabiting. Where federal and provincial laws differ, it has been identified throughout this publication.

Parenting orders

Parenting orders under the *Divorce Act* and *Family Law Act* (previously known as custody and access orders) will outline the responsibilities, rights, and obligations that parents have regarding their children. They will be divided into decision-making responsibility (what some would refer to as “legal custody”) and parenting time (which replaces both “custody” and “access”).

The law in New Brunswick recognizes that both parents share decision-making responsibility for a child until that is changed by a court order or written agreement. The need to have a parenting order often arises when a marriage or relationship breaks down. It is at such times that parents must decide on arrangements for the care of the children.

What is decision-making responsibility?

A parent with decision-making responsibility (which can be allocated to each parent or solely to one parent) makes significant decisions about a child’s education, religion, healthcare, language, and general well-being. Decision-making responsibility can include many other important decisions about a child’s life.

It is possible for one parent to have a decision-making responsibility for one area of a child’s life, for example religion, while the other parent has decision-making responsibility for another area such as medical care.

I. Joint Decision-Making Responsibility

Joint decision-making responsibility is where each parent continues to share the responsibility to make major decisions for the child. It may or may not mean that the child lives an equal amount of time with each parent. It does mean that parents make the decisions about bringing up the child together. For example, the child may live with only one parent while the other parent still has a say in major decisions. Joint decision-making responsibility requires parents to co-operate with each other.

What is parenting time?

Parenting time would be outlined in a parenting order and would say where a child spends their time.

The purpose of parenting time is for a child to have a meaningful relationship with their parents. Generally, when ordering parenting time, the Court will try to ensure that the child has as much time with each parent as is in their best interests. An agreement or court order will set out the periods of time that the children are in the care of each parent. This schedule depends on the time each parent spent caring for the children before separation, the ages of the children and the work schedules of each parent. There is no 'default schedule'. It is based on the facts and tries to reflect the time that the child was used to spending with each parent. This means that the first weeks and months after separation are often critical. Once a pattern of access has developed after the parents begin living apart, it is very hard to change.

An **agreement** or **court order** will set out the periods of time that the children are in the care of each parent.



What is shared parenting time?

The time during which a parent or a person in the role of a parent is responsible for a child. This includes time when the child is not physically in the care of that person, such as when the child is at school or in daycare.

What is split parenting time?

Split parenting time describes an arrangement where each parent has parenting time with one or more of the children. That means each parent has one or more children living with them more than 60% of the time in the year.

Generally, when ordering parenting time, the Court will try to ensure that the child has as much time with each parent as is in their **best interests**.



II. Arranging Parenting Orders

Is it important to decide on parenting of children post-separation?

For parents who separate it is very important to have decision-making responsibility and parenting time set out by a legal agreement or court order. Without a court order or legal agreement, neither parent has any security or ability to enforce their parenting time and may experience difficulty with third parties in trying to exercise decision-making responsibility.

Can either parent apply for a parenting order?

Yes. In New Brunswick parents have equal right to have decision-making authority and parenting time of the children in the absence of a court order or an agreement, even if they are not married. This includes the parents of an adopted child. If you are not the biological parent but you have raised a child as your own, you may be able to obtain a parenting order regarding a child.

Note: If a person applies for a divorce under the *Divorce Act*, any application for a parenting order under the *Family Law Act* will be suspended unless a Court has given permission to continue.



Can someone other than a parent apply to spend time with a child?

Yes. A non-spouse, such as a grandparent or extended family member may apply to the Court to obtain a contact order to have time carved out of a child's schedule to spend with the non-spouse or family member.

A non-spouse applying for a contact order must ask permission (seek leave of the Court) to make an application under the *Divorce Act*. Under that *Act*, a non-spouse can only apply to the Court for a contact order if one of the parents has already filed an application in family court for parenting time in the past. The Court will generally only make a contact order if the person cannot see the child during one of the parent's parenting time.

A person seeking contact with a child under the *Family Law Act*, who is not a parent, may apply for a contact order without the Court's permission. In determining whether to make a contact order, the Court will consider all relevant factors, including if contact between the person and the child could occur during the parenting time of another person.

Can I be involved in the life of a child while waiting for the Court to make a decision on a contact order?

Yes. The Court can make temporary contact arrangements called an **interim contact order** until it makes a final decision on a contact order application.



Can someone other than a parent apply for decision-making responsibility?

Yes. Third parties such as grandparents, aunts, uncles, or others can also apply for decision-making responsibility. The Court will consider the best interests of the child. However, as noted previously, in a divorce proceeding, any third party must apply to the Court for permission to apply for a parenting order. It may be difficult, because the rights of the parents will come first.

How do we decide about decision-making responsibility and parenting time?



1. **Parents can agree:** You and the other parent can agree on who will get decision-making responsibility and how parenting time will work. You can put the agreement in writing in a parenting agreement or include it in a separation agreement. Because this is such an important issue, you should each consult a lawyer.



2. **Parents can use mediation:** Family mediators are trained to help people settle disputes in an unbiased and neutral fashion. If you need help to reach an agreement, you may want to try the services of a mediator. This option may not be available if the relationship has been an abusive one. Before you finalize any agreement, you should each consult a lawyer.



3. **Parents can ask the Court to decide:** If you cannot agree, you can apply to the Court and a judge will decide for you. The judge will issue a **parenting order**, which sets out the legal responsibilities, rights and obligations of the parents. You may wish to seek help from a lawyer to apply to Court.



Why should I get legal advice?

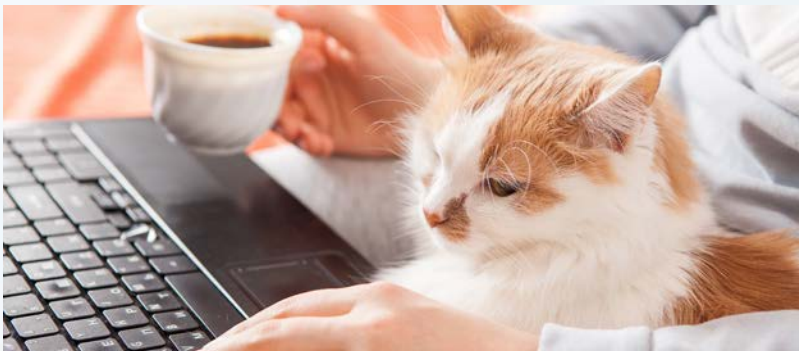
The issues of decision-making responsibility and parenting time can be complicated. No matter how you decide to settle your family law matters, you should each get legal advice from a lawyer. A family law lawyer may be able to help you resolve matters out of Court. It is important to choose the right lawyer for your legal problem. The best references generally are other people who have used that lawyer.

You can also check out the Law Society website (www.lawsociety-barreau.nb.ca) which offers a list of lawyers licensed to practice in N.B. Look under “Member Directory” on the navigation bar. You can see a lawyer’s status or search for a lawyer by city. Or, look in the Yellow Pages of the telephone directory, under “Lawyers”.

What if I can’t afford a lawyer?

If you cannot afford a lawyer and you meet the eligibility criteria, you may be able to get assistance from Legal Aid. Otherwise, you will have to make your own application.

Family Advice Lawyers services may also be available to individuals who are dealing with family law matters. Lawyers provide free general legal information for up to two hours. They can explain what to expect from the court process and help you understand court forms.



For more information
about your options:

www.familylawnb.ca
1-888-236-2444

III. Decision-making Responsibility and Parenting Time Issues

When making a decision about a parenting order, decision-making responsibility, parenting time, and contact orders, the Court will only look at what is in the “best interests of the child”.

The *Divorce Act* and the *Family Law Act* both include the following factors to help in figuring out what is in each child’s best interest:

- The needs of the child, given the child’s age and stage of development, such as the child’s need for stability;
- The child’s relationship with the parents, siblings, grandparents, and any other important person in the child’s life;
- The parent’s willingness to support the child’s relationship with the other parent;
- The history of the child’s care;
- The child’s views (if appropriate);
- The child’s heritage (including language, culture, and religion);
- The plan for the child’s care;
- The ability of the parents to provide care and meet the child’s needs;
- The ability of the parents to communicate and cooperate on matters affecting the child;
- Any family violence (which is very broadly defined); and
- Any civil or criminal proceeding that is relevant to the safety, security, and well-being of the child.

When considering the best interests of the child, the Court may make an order requiring either or both parents and/or their child to participate in a parenting evaluation to be conducted by a mental health professional. Parents should choose someone who is qualified to do such evaluations and has previous experience. Generally, the parents are responsible to find and agree on who will do the evaluation, and to pay for it. Parents may apply for assistance to help with the cost of an evaluation through the Court-Ordered Evaluations Support Program. The level of assistance is based on the parent’s income.

Will my child have a say?

Depending on the age or maturity of your child, the Court may consider their preference to live with one parent. Teenagers are more likely to have a say. However, the Court may be reluctant to place a child in the very difficult position of choosing one parent over another.

Will my children be separated?

Courts usually prefer to keep siblings together. However, they will consider separating siblings if it is in the best interests of the children to do so.

My spouse ended the relationship. Can they still apply for decision-making responsibility or parenting time?

Yes. The Court will not consider past conduct of a parent, unless the conduct relates to their ability to act as a parent. It does not matter whose fault it was that the relationship ended.

Who gets the children while we are waiting to go to Court?

If you cannot agree, a judge can make a temporary decision about decision-making responsibility and parenting time called an **interim parenting order**. Only spouses and those currently in, or seeking, a parental role can apply for an interim parenting order. Again, the Court will look at what is in the best interests of the child. This order will be in effect until the Court issues a final order. An interim parenting order will help you if the other parent takes the child without your permission.

Depending on the age or maturity of your child, the Court may consider their preference to live with one parent.



IV. Living with the Decision

What if I do not agree with the judge's decision?

If you and your lawyer feel that the judge's decision did not properly reflect the circumstances that existed when the order was made, you can ask a higher Court to review the decision by appealing the decision. The judge must have made an error of law, and it is not enough that you did not like the judge's decision. You should always consult with your lawyer.

What if the other parent denies my parenting time? Can I call the police?

Before the police can enforce a parenting order the Court of Queen's Bench – Family Division must direct them to do so. If your parenting time is being denied, you can apply to the Court for help.

Examples of parenting time being denied would include not returning the child to the other parent on completion of parenting time or taking the child outside of their specified parenting time. The Court can order the other parent to obey the order and let the other parent see the child. The Court may even award extra parenting time to make up for the lost time. The judge may find the parent who is denying parenting time to be in contempt of court for disobeying a court order. The penalty for contempt is a fine, or even a jail term. The Court can also order the parent who is denying parenting time to reimburse money spent by the other parent while trying to see the child. The Court may even drastically change the parenting time so that the other parent has the child for the majority of the time.

What if the parent with parenting time is not paying support?

Parenting time and support are two separate legal issues. You cannot prevent the parent with parenting time from seeing the child just because they have stopped paying child support. Similarly, the parent paying support cannot stop making payments because they choose not to visit the child or are denied parenting time.

What if the parent with parenting time decides not to exercise their rights?

Not spending time with their child may jeopardize the arrangements. The other parent could apply to the Court after a certain amount of time seeking an order to end that parenting time.

What if I think my child is being abused during parenting time?

If you think your child is being abused or neglected, you can ask the Court to eliminate the other parent's parenting time, or to impose supervised parenting time only. You will need enough evidence to prove the abuse is occurring. You should also contact the Department of Social Development and report your concerns to Child Protection. Their investigation may confirm the abuse and provide you with evidence for the court application.

Contact

**Child Protection,
Social Development**



My ex-spouse has parenting time and is constantly harassing me. What can I do?

You may ask the Court to order that your ex-spouse pick up and drop off the children at a neutral, safe location - such as a grandparent's house or a social service agency.

You may also be able to use legal remedies such as an Emergency Intervention Order, a restraining order, a peace bond, or criminal harassment charges to protect yourself from phone calls and other unwanted contact. You can get more information about these remedies from PLEIS-NB.

V. Changing the Agreement

Can we change the parenting agreement or parenting order?

Yes.

If there is an agreement: Both parents can agree to change a written parenting agreement. If you need help reaching an agreement, a mediator may be able to help. You should put any changes in writing. Parents should see separate lawyers to get advice about the changes.

If there is a court order: If there has been a significant change in circumstances since the original order, you can apply to the Court to change or cancel the order. An application to change a parenting order is not an appeal. The judge will not re-try the case. Rather, they will only look at evidence of the changed circumstances. It is not easy to change existing decision-making and parenting time arrangements. The judge must be convinced the change will be in the best interests of the child.

Can we change the order informally, without going to Court?

Informal changes of a court order have no legal effect and may jeopardize further rights. For example, a couple may agree to follow a new agreement without changing the court order. If one parent suddenly decides to break the informal agreement, the other parent cannot go to Court to enforce it. It is best to apply to have the order varied.

Can a parent with a parenting order move to another province?

The issue of “relocation” can get very complicated. The *Charter of Rights and Freedoms* makes sure that we can move to any province in Canada. On the other hand, if a parent with parenting time moves, it may threaten the other parent’s relationship with the child.

Under the *Divorce Act* and the *Family Law Act*, relocation is defined as being a move that could have a significant impact on the parenting time or decision-making responsibility of the other parent, or the time the child spends with another person with a contact order or pending court application for a contact order.

In the case of a relocation, the *Divorce Act* provides a form for the relocating parent to provide the other parent within 60 days of the intended move. If the non-moving parent receives the form and does not object within 30 days, and there is no existing order prohibiting the move, then the person giving notice can relocate. If the non-moving parent opposes the move, then the parties will have to go to Court to have a Judge decide on whether or not the child should move.

The *Family Law Act* likewise requires that a relocating parent provide a 60 days notice to the other parent. Under this *Act*, if a person is unable to provide an advance notice of at least 60 days, that person will have to provide reasons in the writing notice.

Under the *Family Law Act*, a Court may, on application, decide that notice is not required or may modify the requirements if there is a **risk of family violence**.



In relocation cases, the Court can also consider: the reason for the move, the impact of the move, the amount of parenting time each parent has, whether the notice was provided, orders or agreements specifying geographic area, reasonableness of the proposal, and compliance with family law obligations (including child support).

I was divorced in another province but now I live with my children in New Brunswick. Can I apply to change the parenting order?

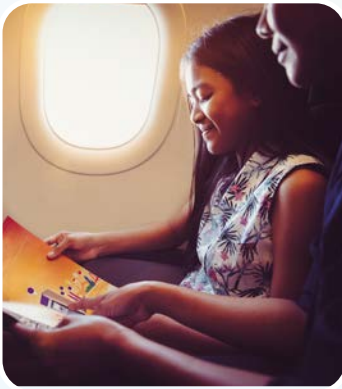
It is possible to apply to change the parenting order in New Brunswick. The Court may change the order here, even when the original order was made in another province. If it is a divorce order, there will be a confirmation hearing where your ex-spouse lives. Before a judge will hear the matter, they will make sure that the child has a strong connection to the province and evidence is available here of what is in the child's best interests.

VI. Special Problems

Parental Abduction

What if my child is taken without my permission?

As noted previously, when a parenting order exists parents may use the family law system to deal with violations of the order. However, a parent, or anyone else, who removes and hides a child under the age of 14 without the consent of a parent with sole decision-making responsibility or the majority of parenting time, commits a criminal offence. Abduction is a crime. The police may charge the abducting parent and issue a Canada wide warrant for their arrest. This enables the police to find and return the child more quickly than by using family court procedures. If the Court treats the charge as a summary conviction offence (less serious) the parent could be jailed for six months and/or pay a fine. If the Court treats the charge as an indictable offence (more serious) the parent could face up to ten years in prison. If you think the other parent has abducted your child, you should contact the police and a lawyer immediately.



What if my child agreed to go with the other parent?

Even if your child has gone willingly, the police can still lay charges. Consent of the child is not a defence to a charge of abduction. It is a defence, however, if the child was taken with the consent of the parent with the sole decision-making responsibility or the majority of parenting time. Another defence is that it was necessary to take the child to protect him or her from danger of imminent harm, such as abuse.

What if I do not have a parenting order?

Although it is always better to have a parenting order, it may not be necessary to have one before the police can lay criminal charges against a parent. However, the parent who had Court must first obtain the consent of the Attorney General. If you think that the other parent may take the child, you should apply to the Court for a parenting order.

Can the parenting order be enforced if my child is taken to another province?

Family law is also intended to prevent parental abduction. As long as you have a parental order, family courts throughout Canada can act to enforce it. If your children have been taken from one province to another, the Court in that province can issue an enforcement order. Although the abducting parent will not be arrested, police officers or a childcare agency will have the authority to find, take charge, and return the child to the other parent. Contact your lawyer immediately.



Note: Under the *Divorce Act*, in cases of wrongful removal, specific conditions must be met for the Court in the province where the child is located to hear an application for a parenting order. If the conditions are not met, the Court in the province where the child usually resided before the removal must hear the application.

What if I think my child will be taken out of the country?

Apply for a parenting order immediately. The Court can take measures to prevent the other parent from taking the children such as issuing an order requiring the other parent to surrender their passport or other travel documents. Always keep a certified copy of the parental order with you and leave a copy with officials at the school or daycare and other places where you take your children, so they are aware of the situation.

If you think the other parent might try to take the children out of the country before a parenting hearing, call your Passport Canada Office. Ask them to put the children's names on a passport control list so that they will not be issued a passport.

If your child has already been taken out of Canada, you still may be able to take action. Canada is one of several countries that has signed **The Hague Convention on Civil Aspects of International Child Abduction**. If the child was taken to a country that has signed the Convention, you can request that the parenting order be enforced, and the child returned. You will have to fill out a Convention application and a sworn affidavit and send it to the central authority in the other country.

Resources and Legal Services

- **Legal Aid:** www.legallaid.nb.ca may be able to take your case if you meet their criteria. For more information and office locations, **consult their website**.
- **Family Law Advice Lawyer Service:** 1-855-266-0266. If you live in the Saint John Region call 506-658-2261.
- **Family Law NB Website:** (www.familylawnb.ca). Offers self-help guides and forms for individuals handling their own family law case.
- **For the Sake of the Children:** a free parenting after separation course. To register, call 1-888-236-2444 or email FTSOTC@gnb.ca.
- **Family Law Information Line:** 1-888-236-2444

PLEIS-NB Publications:

- *Emergency Intervention Orders*
- *Peace Bonds and Protective Orders*
- *Court-Ordered Evaluations Support Program*
- *For the Sake of the Children*

**Changes made to the
Canadian Divorce Act and included in the
New Brunswick Family Law Act as of March 1, 2021**

The Divorce Act and Family Law Act will REPLACE the following terminology:

Terms used before March 1, 2021	Terms used in relation to separating couples March 1, 2021 onwards	Definition
Access (parental)	Parenting Time	Parenting time is defined as the period during which an individual is primarily responsible for the child, including when the child is in school or daycare.
Access (non-parental)	Contact Order	A family member other than a parent, or another significant person in the child's life (such as grandparent), may ask the court for leave to apply for a contact order to see the child. A contact order if granted, would allow the person to spend time with or to communicate with the child. A decision about whether to make a contact order would be made based on the best interests of the child. Persons with contact orders are not automatically entitled to make day-to-day decisions about the child during contact.
Custody	Decision-Making Responsibility	Decision-making responsibility means the responsibility for making significant decisions about a child's well-being, including in respect of: (a) health (such as whether to undergo a medical procedure) (b) education (such as choice of school) (c) culture, language, religion and spirituality (such as which faith the child will follow, if any) (d) significant extra-curricular activities (meaning activities that require a relatively large investment of the parent's time or financial resources)
Custody Order	Parenting order	An order made under the Divorce Act or Family Law Act. Both spouses, a parent, or any person who currently has or is seeking a parental role in the life of a child, may apply for a parenting order. A parenting order may outline parenting time and decision-making responsibility.

Public Legal Education and Information Service of New Brunswick
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You can find a chart which outlines the new terms in the *Divorce Act* and *Family Law Act* on the PLEIS-NB website.